

### § 845.303

which he or she should have known to be material; or

(3) Whether he or she accepted a payment that he or she knew or should have known to be erroneous.

(b) *Mitigation factors.* The individual's age, physical and mental condition or the nature of the information supplied to him or her by OPM or a Federal agency may mitigate against finding fault if one or more of these factors contributed to his or her submission of an incorrect statement, a statement that did not disclose material facts in his or her possession, or his or her acceptance of an erroneous overpayment.

### § 845.303 Equity and good conscience.

Recovery is against equity and good conscience when—

(a) It would cause financial hardship to the person from whom it is sought;

(b) The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment he or she either has relinquished a valuable right or has changed positions for the worse; or

(c) Recovery would be unconscionable under the circumstances.

### § 845.304 Financial hardship.

Financial hardship may be deemed to exist in, but not limited to, those situations when the annuitant from whom collection is sought needs substantially all of his or her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.

(a) *Considerations.* Some pertinent considerations in determining whether recovery would cause financial hardship are as follows:

(1) The individual's financial ability to pay at the time collection is scheduled to be made.

(2) Income to other family member(s), if such member's ordinary and necessary living expenses are included in expenses reported by the annuitant.

(b) *Exemptions.* Assets exempt from execution under State law should not be considered in determining an individual's ability to repay the indebtedness. Rather primary emphasis will be placed upon the annuitant's liquid as-

### 5 CFR Ch. I (1–1–16 Edition)

sets and current income in making such determinations.

### § 845.305 Ordinary and necessary living expenses.

An individual's ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, transportation, food, clothing, insurance (life, health, and accident), taxes, installment payments, medical expenses, support expenses for which the annuitant is legally responsible, and other miscellaneous expenses that the individual can establish as being ordinary and necessary.

### § 845.306 Waiver precluded.

Waiver of an overpayment cannot be granted when—

(a) The overpayment was obtained by fraud; or

(b) The overpayment was made to an estate.

### § 845.307 Burdens of proof.

(a) *Burden of OPM.* The Associate Director must establish by the preponderance of the evidence that an overpayment occurred.

(b) *Burden of annuitant.* The recipient of an overpayment must establish by substantial evidence that he or she is eligible for waiver or an adjustment.

## Subpart D—Agency Requests to OPM for Recovery of a Debt From the Civil Service Retirement Fund

### § 845.401 Purpose.

This subpart prescribes the procedures to be followed by a Federal agency when it requests the Office of Personnel Management (OPM) to recover a debt owed to the United States by administrative offset against money due and payable to the debtor from the Fund. This subpart also prescribes the procedures that OPM must follow to make these administrative offsets.

### § 845.402 Scope.

This subpart applies to agencies and debtors, as defined by § 845.403.

### § 845.403 Definitions.

In this subpart—